

FILE COPY

STATE OF WISCONSIN
BEFORE THE REAL ESTATE BOARD

IN THE MATTER OF DISCIPLINARY
PROCEEDINGS AGAINST

RANDALL KRYSSINSKI,
RESPONDENT.

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:
FINAL DECISION
AND ORDER
LS9508042REB

The State of Wisconsin, Real Estate Board, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, makes the following:

ORDER

NOW, THEREFORE, it is hereby ordered that the Proposed Decision annexed hereto, filed by the Administrative Law Judge, shall be and hereby is made and ordered the Final Decision of the State of Wisconsin, Real Estate Board

The Division of Enforcement and Administrative Law Judge are hereby directed to file their affidavits of costs, and mail a copy thereof to respondent or his or her representative, within 15 days of this decision.

Respondent or his or her representative shall mail any objections to the affidavit of costs filed pursuant to the foregoing paragraph within 30 days of this decision, and mail a copy thereof to the Division of Enforcement and Administrative Law Judge.

The rights of a party aggrieved by this Decision to petition the board for rehearing and the petition for judicial review are set forth on the attached "Notice of Appeal Information."

Dated this 7 day of Dec. 1995.

Becked V. Brooks

STATE OF WISCONSIN
BEFORE THE REAL ESTATE BOARD

IN THE MATTER OF
DISCIPLINARY PROCEEDINGS AGAINST

RANDALL KRYSENSKI

LS9508042REB

Respondent

PROPOSED DECISION

The parties to this proceeding for the purposes of sec. 227.53. Stats., are:

Randall Krynski
N54 W30850 Windwood Drive
Hartland, WI 53029

State of Wisconsin Real Estate Board
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708

State of Wisconsin Department of Regulation & Licensing
Division of Enforcement
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53709

This matter was commenced by the filing of a Complaint by the Division of Enforcement on August 3, 1995, and a hearing in the matter was conducted on September 12, 1995. Respondent appeared in person and by Attorney Thomas Herzog. Appearing for the Division of Enforcement was Attorney Roger R. Hall. The transcript of the proceedings was received on October 16, 1995.

Based upon the entire record in this case, the administrative law judge recommends that the Real Estate Board adopt as its final decision in the matter the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Randall Krysinski, N54 W30850 Windwood Drive, Hartland, WI 53029 (respondent), is licensed as a real estate broker in Wisconsin by license #2811, issued on May 22, 1972. His license was summarily suspended by the Real Estate Board on July 27, 1995.

2. At all times material to this matter, respondent was President, Chief Executive Officer, owner and operator of AMA Industries, Inc., and Mayfair Real Estate, Inc., with offices located at 810 Cardinal Lane, Hartland, Wisconsin. Both real estate corporations are licensed by the Department of Regulation and Licensing by license numbers 834312 and 834447, issued on September 24, 1992, and September 3, 1993, respectively. Respondent also did business as REMAX West, Inc. (REMAX), at 810 Cardinal Lane, Hartland, Wisconsin, which is not in fact a corporation.

3. Respondent maintained a business account (Account #207431709) and a trust account (Account #20743717) in the name of REMAX at Bank One, P.O. Box 2071, Milwaukee, Wisconsin. Respondent also maintained a business account at Firststar Bank, Milwaukee, in the name of AMA Industries (Account # 104-1008), and a personal checking account at Bank One, Brookfield (Account #8824-2381).

4. Between May, 1993 and May, 1995, Gene Kleinert, an auditor with the Department of Regulation & Licensing (department), conducted an audit of the real estate trust accounts of REMAX.

5. As of May 28, 1993, the audit revealed a shortage of trust funds in the REMAX trust account of \$32,815.83. On July 30, 1993, the audit revealed a shortage in the REMAX trust account of \$41,315.83. By letter dated August 17, 1993, the department notified respondent that he must immediately reimburse the trust account in the full amount of the shortage and submit verification to the department not later than August 27, 1993.

6. By letter dated October 28, 1993, the department again notified respondent that he must reimburse the REMAX trust account and submit verification of the reimbursement to the department. Respondent replied in a letter dated November 5, 1993, stating that he calculated the shortage in the REMAX trust account through the months of September, October and November, 1993, to be approximately \$45,000. No reimbursement was made.

7. A further audit of the REMAX trust account was performed by Mr. Kleinert in May, 1995. The audit revealed the following shortages in the account. The figures in parentheses are the amounts of the shortages as calculated by respondent and included on the monthly trust account reconciliations prepared by him. Improper withdrawals from and deposits to the trust account are shown in brackets.

- (a) Reconciliation dated September 30, 1993: \$44,950.35 (Respondent estimated \$45,000) [\$4000 total improper disbursements from the account].
- (b) Reconciliation dated October 29, 1993: \$44,950.35 (Respondent estimated \$45,000).
- (c) Reconciliation dated November 30, 1993: 45,950.35 (Respondent estimated \$45,000).
- (d) Reconciliation dated December 31, 1993: \$44,950.35 (Respondent estimated \$37,500)
- (e) Reconciliation dated January 31, 1994: \$47,950.35 (Respondent estimated 40,500) [\$3000 total improper disbursements from the account].
- (f) Reconciliation dated February 28, 1994: \$58,950.35 (Respondent estimated \$64,000) [\$3000 total improper disbursements from the account.]
- (g) Reconciliation dated March 31, 1994: \$80,500.00 (Respondent estimated \$80,500) [\$11,000 total improper disbursements from the account].
- (h) Reconciliation dated April 29, 1994: \$86,450.35 (Respondent estimated \$91,500) [\$7000 total improper disbursements from the account].
- (i) Reconciliation dated May 31, 1994: \$89,470.35 (Respondent estimated 94,500) [\$3000 total improper disbursements from the account].
- (j) Reconciliation dated June 30, 1994: \$76,731.47 (Respondent estimated \$83,929.85) [\$11,000 total improper disbursements from the account].
- (k) Reconciliation dated July 29, 1994: \$86,731.47 (Respondent estimated \$92,929.85) [\$10,000 total improper disbursements from the account].
- (l) Reconciliation dated September 1, 1994: \$89,231.47 (Respondent estimated \$91,929.35) [\$2000 from the REMAX business account deposited into the trust account].
- (m) Reconciliation dated September 30, 1994: \$76,431.47 (Respondent estimated \$79,129.85) [\$2000 from respondent's personal account and \$10,800 from the REMAX business account deposited in the trust account].
- (n) Reconciliation dated October 31, 1994: \$74,931.47 (Respondent estimated \$72,931.47) [\$15,000 in improper disbursements from the trust account. \$12,000 from the REMAX business account deposited in the trust account].
- (o) Reconciliation dated November 30, 1994: \$74,931.47 (Respondent estimated \$70,139.50).
- (p) Reconciliation dated December 30, 1994: \$57,931.47 (Respondent estimated \$44,139.85).
- (q) Reconciliation dated January 31, 1995: \$57,931.47 (Respondent estimated \$44,129.85).
- (r) Reconciliation dated February 28, 1995: \$66,631.47 (Respondent estimated \$52,829.85) .
- (s) Reconciliation dated March 31, 1995: \$66,631.47 (Respondent estimated \$52,829.85).
- (t) Reconciliation dated April 28, 1995: \$67,831.47 (Respondent estimated \$54,029.85 [\$1200 total improper disbursements from the account])

8. The REMAX trust account was overdrawn on two occasions. In July, 1994, the account became overdrawn by approximately \$100. In August, 1994, the account became overdrawn by approximately \$1500.

9. During the period in question, respondent's company was operating on a deficit basis. Respondent intentionally withdrew REMAX trust funds paid in trust by buyers and sellers and deposited them in the REMAX business account to be utilized to capitalize the company's operations. This was done without knowledge or consent of the buyers and sellers.

10. Respondent indicated on each month's trust account reconciliation the amount of the deficit owing to the trust account, and he was consistently cooperative with the department and with Mr. Kleinert during the course of the various audits performed.

11. During the month of September, 1995, respondent was able to borrow capital to reimburse, and he did in fact reimburse, the REMAX trust account for trust funds previously improperly withdrawn and placed in the business account.

CONCLUSIONS OF LAW

1. The Real Estate Board has jurisdiction in this matter pursuant to sec. 452.14, Stats.

2. By improperly converting funds from the REMAX trust fund to the REMAX business account during a period extending from at least May, 1993, until September, 1995, respondent has disbursed trust funds from his real estate trust account contrary to the terms of his contracts with the buyers and sellers who have paid those funds in trust, in violation of sec. RL 18.09(2) and (4), Code; has commingled trust funds with personal funds, in violation of sec. RL 18.10, Code; and has issued checks upon his trust account which contained insufficient funds, in violation of sec. RL 24.15, Code. Pursuant to secs. RL 18.14 and RL 24.01(3), Code, respondent has thereby demonstrated incompetence to act as a real estate broker in a manner as to safeguard the interests of the public, in violation of sec. 452.14(3), Stats.

ORDER

NOW, THEREFORE, IT IS ORDERED that the license of Randall Krynski to practice as a real estate broker in the State of Wisconsin be, and hereby is, suspended for an indefinite period of not less than six months, commencing on July 27, 1995.

IT IS FURTHER ORDERED that after January 27, 1996, Mr. Krynski may petition the Real Estate Board for reinstatement of his license. Mr. Krynski shall as a condition of

reinstatement submit evidence satisfactory to the board that REMAX is in full compliance with all requirements of ch. RL 18, Code, and shall submit other evidence deemed necessary by the Real Estate Board demonstrating that he is otherwise in compliance with the real estate statutes and code, including any evidence required by the board demonstrating that he has not violated the unlicensed practice provisions of sec. 452.03, Stats

IT IS FURTHER ORDERED that upon reinstatement of his license, Mr. Krysinski shall be required for a period of two years to submit quarterly reports to the board documenting his continuing compliance with the requirements of ch. RL 18, Code.

IT IS FURTHER ORDERED that, pursuant to sec. 440.22, Stats., the costs of this proceeding are assessed against Mr. Krysinski.

OPINION

Mr. Krysinski does not deny that over the period of time in question, he withdrew funds from the REMAX trust account and deposited them in the REMAX business account in order to cover the firm's operating deficit. He continued to operate in this manner even after the practice was discovered through a routine audit conducted by the department in May, 1993. Moreover, not only did he continue the practice after its discovery by the board, he actually increased the amount of the trust account shortfall from approximately \$33,000 in May, 1993, to as much as \$90,000 in May, 1994. Mr. Krysinski did not attempt to mislead the department as to this practice; in fact he provided the department with records documenting his calculations as to the trust account shortages through the period in question. But he did little or nothing to remedy the situation until the board finally summarily suspended his license in July, 1995.

It appears that Mr. Krysinski felt that so long as no party to any transaction was deprived of payments due and owing from the trust account (apparently none was), and so long as he remained resolute in his determination that the trust account would eventually be made whole, his actions were, if not justified, at least defensible. His testimony in that regard includes the following:

Typically speaking, most of the disbursements that come out of a trust account go to the broker as a partial payment of the commission. . . . What we call due broker as a disbursement from the trust account. And in the situation that I was in at that point in early 1993, there were some closings coming that I had coming, where commissions were due me, and what I did was I advanced those due broker funds from the trust account to the business account in order to remain solvent and the intent simply was to not take those monies then when the commissions were actually paid, i.e. at the time of the closing of the individual transactions. So I was advancing the funds to the business account in order to stay in business at that point because it was my only source of capitalization. [I

had absolutely anticipated paying that money back or making up the shortages.] That was why on every single month of my trust fund reconciliation I included on the bottom of that a notation that identified exactly what balance there was that would be due at that point based on the amount of money that had been advanced. . . . It was done quite frankly openly because again I didn't have any choice. I made a poor business decision in doing that, rather than simply closing the doors. (Tr., pp. 25-26)

It is well established that the purposes of licensee discipline in Wisconsin are to protect the public, to deter other licensees from engaging in similar conduct, and to promote the rehabilitation of the licensee. *State v. Aldrich*, 71 Wis. 2d 206 (1976). Punishment of the licensee is not an appropriate consideration. *State v. McIntyre*, 41 Wis. 2d 481 (1969). The prosecutor in this case urged that Mr. Krysinski's license should be revoked, and given the seriousness of the misconduct, these disciplinary objectives would certainly seem to support such a result. There is considerable mitigation here, however. First, no person was apparently harmed by Mr. Krysinski's actions, and his credible testimony was that he delayed taking commissions due him to ensure that no customer harm occurred. Also credible was his testimony that his actions were not for the purpose of personal gain, but exclusively to keep the business in operation. That testimony is bolstered by the fact that he consistently documented the trust fund shortages, never attempted to mislead or withhold information from the department's auditor, and otherwise fully cooperated in the various audits performed. Next, the evidence is that the trust fund has now been made whole and that the practice of advancing "broker due" funds before they are earned has stopped.¹ Finally, Mr. Krysinski's past history in the real estate industry probably also constitutes a mitigating factor. He testified that during the 1980's, he served on the Waukesha Board of Realtors and participated in the licensing law committee of the Wisconsin Realtors Association, spearheading the development of standardized contingency language to be used in offers to purchase. He also was involved in and appeared before the Real Estate Board during that period on the subject of standardization of real estate condition reports in the State of Wisconsin.

On balance, respondent appears to be a capable and basically well-intended real estate broker that took a calculated risk to save his company and got caught. While Mr. Krysinski would probably prefer to have his actions characterized as treating trust fund moneys as earned before the affected transactions actually closed, the fact remains that he was withdrawing trust funds to which he did not yet have any right. Such misconduct certainly deserves strong discipline, though the mitigating factors set forth above militate against outright revocation. On January 27, 1995, Mr. Krysinski will

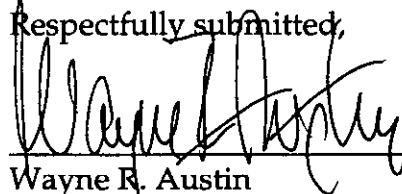
¹ Exhibit 11 is a transaction history prepared by Bank One, Milwaukee, listing transactions for the REMAX trust account from August 15 through August 24, 1995. Three deposits have been highlighted; a \$20,000 deposit on August 15, a \$16,000 deposit on August 17, and a \$25,000 deposit on August 18. Mr. Krysinski's testimony was that \$1000 of the August 18, 1995 deposit constituted client trust funds, and that there was an earlier \$6000 deposit made to reimburse the fund which does not show on the transaction history. The sum of these various deposits, less that part of the August 18 deposit which constituted new trust funds, is \$66,000, the apparent total shortage in the fund at that time.

have been out of practice for six months. If at that time he is able to make a showing that REMAX is in full compliance with the trust fund provisions of ch. RL 18, Code, along with whatever other showings the board deems appropriate, then his petition for reinstatement of his license should be granted, conditioned upon submission by him for a period of two years of quarterly reports documenting his continuing compliance with the trust fund requirements.

Finally, it should be noted that Count II of the Complaint in this matter alleges a violation of sec. 943.20(1)(b) of the criminal statutes. Whether respondent is guilty of criminal misappropriation of monies is a matter to be determined by the courts rather than the board, and no criminal conviction for violation of that provision has occurred. Accordingly, no finding has been made relative to complainant's assertion that respondent has violated a law substantially related to the practices of a real estate broker, in violation of sec. RL 24.17, Code.

Dated this 25th day of October, 1995.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Wayne R. Austin", is written over a horizontal line.

Wayne R. Austin
Administrative Law Judge

NOTICE OF APPEAL INFORMATION

Notice Of Rights For Rehearing Or Judicial Review, The Times Allowed For Each, And The Identification Of The Party To Be Named As Respondent.

Serve Petition for Rehearing or Judicial Review on:

STATE OF WISCONSIN REAL ESTATE BOARD

1400 East Washington Avenue

P.O. Box 8935

Madison, WI 53708.

The Date of Mailing this Decision is:

December 11, 1995

1. REHEARING

Any person aggrieved by this order may file a written petition for rehearing within 20 days after service of this order, as provided in sec. 227.49 of the *Wisconsin Statutes*, a copy of which is reprinted on side two of this sheet. The 20 day period commences the day of personal service or mailing of this decision. (The date of mailing this decision is shown above.)

A petition for rehearing should name as respondent and be filed with the party identified in the box above.

A petition for rehearing is not a prerequisite for appeal or review.

2. JUDICIAL REVIEW.

Any person aggrieved by this decision may petition for judicial review as specified in sec. 227.53, *Wisconsin Statutes* a copy of which is reprinted on side two of this sheet. By law, a petition for review must be filed in circuit court and should name as the respondent the party listed in the box above. A copy of the petition for judicial review should be served upon the party listed in the box above.

A petition must be filed within 30 days after service of this decision if there is no petition for rehearing, or within 30 days after service of the order finally disposing of a petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing.

The 30-day period for serving and filing a petition commences on the day after personal service or mailing of the decision by the agency, or the day after the final disposition by operation of the law of any petition for rehearing. (The date of mailing this decision is shown above.)

STATE OF WISCONSIN
BEFORE THE REAL ESTATE BOARD

IN THE MATTER OF THE DISCIPLINARY
PROCEEDINGS AGAINST

RANDALL KRYSENSKI,
RESPONDENT.

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:
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AFFIDAVIT OF COSTS
LS 9508042 REB

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

Roger R. Hall, being duly sworn, deposes and states as follows:

1. That I am an attorney licensed in the state of Wisconsin and is employed by the Wisconsin Department of Regulation and Licensing, Division of Enforcement:

2. That in the course of those duties I was assigned as a prosecutor in the above-captioned matter; and

3. That set out below are the costs of the proceeding accrued to the Division of Enforcement in this matter, based upon Division of Enforcement records compiled in the regular course of agency business in the above-captioned matter.

PROSECUTING ATTORNEY EXPENSE

<u>Date</u>	<u>Activity</u>	<u>Time Spent - Hours</u>
10/12/94	Telephone conference with Paul Roach, Assistant District Attorney for Waukesha County	0.2 hours
12/05/94	Telephone conference with Auditor Kleinert	0.2 hours
02/08/95	Telephone conference with Auditor Kleinert relating to Krysinski audit	0.6 hours
02/28/95	Telephone conference with Board Advisor	0.1 hours

04/27/95	Conference with Auditor Kleinert regarding the status of his audit	0.4 hours
06/09/95	Conference with Auditor Kleinert to review his audit conclusions	0.9 hours
06/15/95	Review audit materials of ReMax West trust account	2.9 hours
06/19/95	Review trust account audit materials with Auditor Kleinert	1.9 hours
06/20/95	Draft disciplinary complaint and affidavit	3.2 hours
06/22/95	Draft affidavit	3.5 hours
06/23/95	Review file and draft final disciplinary complaint	3.9 hours
06/29/95	Draft petition for summary suspension	3.9 hours
07/05/95	Conference with Auditor Kleinert regarding petition for summary suspension	3.0 hours
07/06/95	Review auditor exhibits	2.0 hours
07/07/95	Draft Order for summary suspension	3.4 hours
07/26/95	Conference with Auditor Kleinert, preparation for summary suspension hearing	4.9 hours
07/27/95	Preparation for hearing and appearance at hearing	2.3 hours
08/01/95	Telephone conference with Attorney Herzog; draft notice of hearing and review file	1.9 hours

08/03/95	Draft final disciplinary complaint	2.0 hours
09/07/95	Preparation for final hearing	4.2 hours
09/11/95	Preparation for final hearing; conference with Auditor Kleinert	2.5 hours
09/12/95	Preparation for final hearing; appear at disciplinary hearing	3.9 hours
TOTAL HOURS		51.8

Total attorney expense for 51.8 hours at \$41.00 per hour (based upon average salary and benefits for Division of Enforcement attorneys) equals: \$2,123.80

INVESTIGATOR EXPENSE FOR TRUST ACCOUNT AUDITING


<u>Date</u>	<u>Activity</u>	<u>Time Spent</u>
08/04/93	ReMax record investigation	12.0 hours
08/05/93	Preparation of audit	8.0 hours
08/17/93	Preparation of audit	8.0 hours
10/28/93	Draft correspondence to Mr. Krysinski	0.5 hours
11/24/93	Draft correspondence/memo	0.5 hours
12/02/94	Draft correspondence/memo	0.5 hours
01/09/95	ReMax record investigation	3.0 hours
01/10/95	Draft correspondence	0.25 hours
02/24/95	Draft correspondence to Mr. Krysinski	0.25 hours
05/03/95	ReMax record investigation	16.0 hours
05/04/95	ReMax record investigation	8.0 hours

05/05/95	Preparation of audit	4.0 hours
05/08/95	Preparation of audit	8.0 hours
05/09/95	Preparation of audit	8.0 hours
05/10/95	Preparation of audit	8.0 hours
05/11/95	Preparation of audit	8.0 hours
05/12/95	Preparation of audit	8.0 hours
05/15/95	Preparation of audit	8.0 hours
05/16/95	Preparation of audit	9.5 hours
05/17/95	Preparation of audit	5.0 hours
05/18/95	Preparation of audit	8.5 hours
05/19/95	Preparation of audit	3.0 hours
06/26/95	Draft correspondence/memo	0.5 hours

TOTAL HOURS	135.5
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Total investigator expense for 135.5 hours at \$20.00 per hour (based upon average salary and benefits for Division of Enforcement investigators) equals:	\$2,710.00
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TOTAL ASSESSABLE COSTS	\$4,833.80
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 Roger R. Hall

Subscribed and sworn to before me
 this 20 day of December, 1995.



 Notary Public

My Commission is permanent

RRH:kcb
 ATY-DLG2029

STATE OF WISCONSIN
BEFORE THE REAL ESTATE BOARD

IN THE MATTER OF DISCIPLINARY
PROCEEDINGS AGAINST

LS9508042REB

RANDALL KRYNSINSKI,

Respondent

AFFIDAVIT OF COSTS
OFFICE OF BOARD LEGAL SERVICES
(SEC. 440.22, STATS.)

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

Wayne R. Austin, being first duly sworn on oath, deposes and states as follows:

1. Your affiant is an attorney licensed to practice law in the State of Wisconsin, and is employed by the Wisconsin Department of Regulation & Licensing, Office of Board Legal Services.
2. In the course of his employment, your affiant was assigned as administrative law judge in the above-captioned matter.
3. Set out below are the actual costs of the proceeding for the Office of Board Legal Services in this matter.

ADMINISTRATIVE LAW JUDGE EXPENSE

Wayne R. Austin

DATE &
TIME SPENT

ACTIVITY

9/12/95
1 hour, 25 minutes

Conduct Hearing

9/28/95
14 minutes

Prepare Proposed Decision

10/23/95
2 hours, 18 minutes

Prepare Proposed Decision

10/23/95
2 hours, 24 minutes

Prepare Proposed Decision

10/24/95
3 hours, 11 minutes

Prepare Proposed Decision

10/25/95
1 hour, 11 minutes

Prepare Proposed Decision

Total Time Spent.....10 hours 43 minutes

Total administrative law judge expense for Wayne R. Austin:
10 hours, 43 minutes @ \$44.55, salary and benefits:

\$477.43

REPORTER EXPENSE

Magne-Script

DATE &
ACTIVITY

COST

9/12/95
Appearance

\$75.00

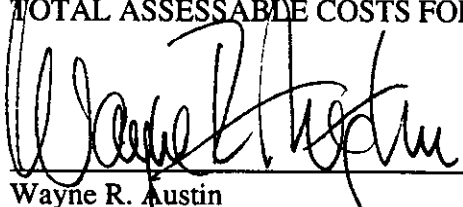
Prepare Transcript
54.0 Pages

\$178.20

Total billing from Magne-Script reporting
service (Invoice #9235, dated 10/17/95)


\$253.20

TOTAL ASSESSABLE COSTS FOR OFFICE OF BOARD LEGAL SERVICES: \$730.63



Wayne R. Austin
Administrative Law Judge

Sworn to and subscribed before me this 2nd day of January, 1996.



Notary Public, State of Wisconsin
My commission is permanent